Petition

Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL RAY HALEY
WILLIAM HARRY RIEHL,
Petitioners

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION, ARGUMENT AND APPENDIX OF PETITIONERS

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QUESTIONS PRESENTED

1. Where state trooper tears open green opague garbage bag found in defendants' car trunk during stop for traffic violation, whether marijuana found therein should be suppressed pursuant to *Robbins* v. *California*, ____ U.S. ____. (1981).

2. Where circumstances require a warrant before defendants' car can be searched and the search is directed by agent of federal government whether a search warrant substantially complying with Rule 41(a) of the Federal Rules of Criminal Procedure is required to meet minimum Fourth Amendment requirements.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	11

TABLE OF CASES

Cases	Page
Byers v. *United States*, 273 U.S. 28, 33 (1926)	6, 8
Cady v. *Dombrowski*, 413 U.S. 433 (1973)	6
Carroll v. *United States*, 267 U.S. 132 ( )	8
Chambers v. *Maroney*, 399 U.S. 42 (1970)	6, 8
Elkins v. *United States*, 364 U.S. 206 (1960)	8, 9
Lustig v. *United States*, 338 U.S. 74, 79 (1948)	6, 7, 8
Robbins v. *California*, ____ U.S. ____, No. 80-148	1, 5
State of New York v. *Belton*, ____ U.S. ____ (1981)	8
Texas v. *White*, 423 U.S. 67 (1975)	6
United States v. *Burke*, 17 F.2d 377 (2d Cir. 1975)	9, 10
United States v. *Hamlin*, 540 F.2d 742 (4th Cir. 1976)	8
United States v. *Haynie*, 647 F.2d 227, 233 (4th Cir. 1974)	6

United States v. *Johnson*, 451 F.2d ____ (5th Cir.) 8

United States v. *Navarro*, 400 F.2d ____ (5th Cir.) 8, 9, 10

United States v. *Sifuentes*, 504 F.2d 845 (4th Cir. 1978) 6

United States v. *Seidlitz*, 589 F.2d 152 (4th Cir. 1978) 8

United States v. *Sellers*, 483 F.2d 37 (5th Cir. 1973) 10

Wong Sun v. *United States*, 371 U.S. 471 (1963) 5

INDEX TO APPENDIX

Fourth Circuit Opinion of January 21, 1982 ..... 1A

Order of United States District Court for Southern District of W. Va. July 1, 1980 ..... 13A

IN THE

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OCTOBER TERM 1981

No._____

MICHAEL RAY HALEY
WILLIAM HARRY RIEHL,
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v.
UNITED STATES OF AMERICA,[1]
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States.

Michael Ray Haley and William Harry Riehl, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on January 21, 1982.

QUESTIONS PRESENTED

1. Where state trooper tears open green opague garbage bag found in defendants' car trunk during stop for traffic violation, whether marijuana found therein should be suppressed pursuant to *Robbins* v. *California*, ____ U.S. ____ (1981).

2. Where circumstances require a warrant before defendants' car can be searched and the search is directed by agent of federal government whether a search warrant substantially complying with Rule 41(a) of the Federal Rules of Criminal Procedure is required to meet minimum Fourth Amendment requirements.

[1]Caption contains all parties.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit reported at ____ F2d ____ (4th Cir. 1981) is reproduced in Appendix A hereto, infra page . The order of the United States District Court for the Southern District of West Virginia is reproduced at page , infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 21, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. Constitution Amendment IV.
2. USCS Rules of Criminal Procedure, Rule 41(a).

STATEMENT OF THE CASE

Michael Ray Haley and William Harry Riehl were indicted on February 28, 1980, by a Federal Grand Jury in Charleston, West Virginia. Each was charged with violating 18 U.S.C. § 841 (a) (3) and (2) and 21 U.S.C. § 841 (a) (1) and (2).

Approximately 204 pounds of marijuana were seized during a search of defendants' car by state and federal authorities on February 10, 1980. Defendants each filed motions to suppress this evidence. At the close of an evidentiary hearing held before Judge Charles Haden, II, on April 10, 1980, the motions were denied.

On April 28, 1980, the date scheduled for trial, defendants Haley and Riehl each filed a Motion To Reconsider his Motion To Suppress and, in addition, each defendant filed an Amended Motion To Suppress Evidence based on Rule 41 of The Federal Rules of Criminal Procedure considerations. Following an evidentiary hearing that same day, Judge Haden lifted and vacated his former ruling on defendants' motions and granted defendants' renewed and amended motions to suppress

evidence. On July 2, 1980, Judge Haden entered an Order confirming his ruling.

The Government appealed this ruling to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit reversed Judge Haden and defendants now petition for certiorari.

The pertinent facts are as follows:

During the late morning hours of February 10, 1980, Michael Ray Haley and William Harry Riehl were traveling in a borrowed car north along I-79 near Charleston, West Virginia. Haley was driving. Trooper Clayton Alford, driving routine road patrol, stopped Haley for speeding. Trooper Alford had no other reason for the stop.

While Haley was seated in the front passenger seat of Alford's police cruiser, Alford detected the odor of what he believed to be marijuana smoke. He asked Haley if he had been smoking marijuana or been around anyone else smoking marijuana. Haley denied that he had.

During the process of writing a speeding ticket, Alford learned that the car belonged to a resident of Flordia, who had lent the car to William Riehl and Haley.

After writing the ticket, Alford approached the passenger side of the car, and Riehl, who was still seated there, rolled down the window. Alford asked Riehl if he had been smoking marijuana or if he had been around anyone who had. Riehl denied it. There was no evidence that anything but marijuana smoke was smelled. Both defendants then refused to consent to a search of the car.

Upon this refusal, Trooper Alford advised Haley and Riehl that he was going to obtain a search warrant for the vehicle and until then they would be detained and not free to leave. Once in the patrol car, defendant Riehl testified that Alford offered to "dump" any marijuana defendants had; and that he was not "into busting a couple of kids going on vacation". Riehl then admitted that there was a small amount of marijuana in the car. Along with Trooper

Alford, he went to the front passenger side of the car and produced from under the seat a small bag which appeared to contain marijuana. Haley and Riehl were placed under arrest and Alford called a tow truck.

James Laner, an employee of Copley Wrecker Service, arrived a short time later. After Laner had secured the vehicle to the tow truck, Trooper Alford proceeded to unlock the car's trunk. Several garbage bags, apparently full, were viewed. Alford testified that he immediately shut the trunk lid. Laner testified, however, that Alford reached in, tore one of the bags open, and exclaimed to Laner, "Just what I thought".[2]

Alford directed that the car be towed to Company B headquarters in South Charleston, West Virginia. Enroute there, Alford requested special drug units to meet him. In turn, Randolph James, Drug Enforcement Administration, appeared at Company B to assist.

During the course of the afternoon of February 10, 1980, Agent James assisted in procuring a "state court" search warrant,[3] and helped search defendants' car. Six plastic bags were found in the back seat of the car and eleven plastic bags and two boxes, all full of marijuana, were found in the trunk.

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[2]Although Alford testified at the April 10, 1980 hearing that he didn't tear open the bag and that he was able to observe what he thought was marijuana through a small hole already there, the District Judge discredited this testimony and instead relied on the version supplied by Laner.

[3]Agent James testified at the April 28 hearing regarding the search warrant:

> Q: How was this affidavit prepared?
>
> A: Trooper Alford . . . I wrote it out. I wrote the affidavit out.
>
> Q: You wrote it out?
>
> A: Just roughed out notes. Okay. He and I, Trooper Alford and I, went through the probable cause of the facts and roughed them out.

ARGUMENT

(1) *The Robbins* v. *California*, ____ U.S. ____ (1981) *Question.*

The District Judge discredited Trooper Alford's testimony where it was contradicted by tow truck driver Laner as to the ripping open of the garbage bag found in the trunk of defendants' car. Alford testified that he saw marijuana through a hole in the bag. Laner testified that Alford stuck his fingers in the bag and ripped it open, thus exposing the marijuana. The District Court credited Laner's version. Any conflict, therefore, between Laner and Alford must be resolved against Alford. The garbage bag, thus, was a sealed container within the meaning of *Robbins* v. *California*, ____ U.S. ____ (1981).

Under the rule of *Robbins*, supra, only a container which "so clearly announce[s] its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer", may be opened without a warrant. ____ U.S. ____ at ____. There is no evidence in this case of any of the factors identified in *Robbins* as creating an exception to the search warrant requirement.

There was no distinctive odor coming from the bag or trunk; there was no distinctive configuration belying the contents of the bag; the container was not open and was not transparent.

Alford, therefore, engaged in an unlawful, warrantless search of the garbage bag. The evidence must, therefore, be suppressed as fruit of the poison tree. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

(2) *The U.S.C.S. Rules of Criminal Procedure, Rule 41(a) Question.*

Assume that Trooper Alford was telling the truth; that he didn't tear open the garbage bag found in defendant's car trunk. In that event, he acted correctly in determining he needed a warrant to search defendant's car. Any circumstances that might have justified an automobile exception search had been extinguished by the time Alford

got around to opening the trunk. *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970); *United States* v. *Haynie*, 637 F.2d 227, 233 (4th Cir. 1980); *United States* v. *Sifuentes*, 504 F.2d 845 (4th Cir. 1974). Likewise, any "station house" exception was by then extinguished. *Texas* v. *White*, 423 U.S. 67 (1925); *Cady* v. *Dombrowski*, 413 U.S. 433 (1973); *Chambers* v. *Maroney*, supra. Defendants' car was not readily mobile; Alford had no prior or immediate knowledge of the contents of the car; the search of the car was remote in time and place from the arrest; the marijuana was not in "plain view".

A search warrant was therefore required. In this case the warrant must have been in substantial compliance with Rule 41(a).

Federal Agent James effectively took charge of the investigation once defendants' car was impounded at state police headquarters.

The critical issue where a local investigation becomes a federal undertaking is whether the federal government's entry is made in accordance with Fourth Amendment principles. In this connection, *Byers* v. *United States*, 273 U.S. 28, 33 (1926) provides:

> "We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers. In that view, so far as this inquiry is concerned, the effect is *the same as though he had engaged in the undertaking as one* exclusively his own" (Emphasis added).

Stated another way, the question is whether or not the actions of the federal agent *at the time he joins or participates in the search*[4] *are lawful under Fourth*

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[4]"The crux of the doctrine is that a search is a search by a federal official if he had a hand in it . . . It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." *Lustig* v. *United States*, 338 U.S. 74, 78-79 (1949).

Amendment and federal standards. For example, in *Lustig* v. *United States*, 338 U.S. 74, 79 (1948), Federal Agent Greene, who was charged with enforcing the counterfeiting laws joined the search of a hotel room by city police after it had already begun. Articles were selected by Greene which were later used as evidence in a federal prosecution. Holding that the evidence should have been suppressed on federal participation grounds, this Court examined the exclusive actions of the federal agent:

> "Where there is participation on the part of the Federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers". *Lustig*, supra at 79.

The Court continued:

> "Nor is the search here defensible as incidental to a lawful arrest. *Greene never made the arrest, he knew that Lustig and Reynolds were not present when he entered the room . . .* " *Lustig*, supra at 80.

The issue, therefore, in this case is not whether the actions of Trooper Alford and other local officials were proper for state prosecution purposes; but whether federal agent James, independent of the stream of events prior to his participation, could have constitutionally searched defendants' car on behalf of the federal government absent a valid "federal search warrant".

A federal warrant was required for the following reasons:

a. The investigation was a federal undertaking.

Federal Agent James became actively involved in the investigation sometime between 1:00 p.m. and 3:00 p.m. on February 10, 1980. He arrived at Company B headquarters; he was driving a government automobile; he agreed and approved of necessity for a search warrant; he helped Alford write the affidavit for the state search warrant; he physically searched defendants' car, finding six bags of marijuana in the back seat and eleven bags and

two boxes in the trunk[5]; he became involved because of his expertise (as did the federal agent in *Lustig*, supra); and he was called in not only for the search, but to assist in any way desired. At this point, the investigation became a "federal undertaking". See *Byers* v. *United States*, supra; *Lustig* v. *United States*, supra; *U.S.* v. *Seidlitz*, 589 F.2d 152 (4th Cir. 1978); *U.S.* v. *Hamlin*, 540 F.2d 742 (4th Cir. 1976); *U.S.* v. *Johnson*, 451 F.2d 1321 (4th Cir. 1971); and *U.S.* v. *Navarro*, 400 F.2d 315 (5th Cir. 1968).

b. When Agent James entered the investigation, no set of circumstances existed permitting the federal government a warrantless search of defendants' automobile.

When the federal government, by Agent James, entered the case, the defendants' car was safely impounded at Company B headquarters; the defendants Haley and Riehl were under arrest for possession of a small bag of marijuana; Agent James was told by local officials that defendants' car hadn't been searched but that marijuana was suspected to be in the car; Agent James was told by Trooper Curdle:

> "That there had been a traffic stop; that it involved two individuals from Florida, and that there had been some drugs seized, marijuana seized, and that they felt that there possibly was additional marijuana in the car".

Based on the facts as known by Agent James at that time he had no justification for a warrantless search of defendants' car. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *U.S.*, 267 U.S. 132 (1925); *State of New York* v. *Belton*, ____ U.S. ____ No. 80-328 (1981).

Citing *Elkins* v. *United States*, 364 U.S. 206 (1960) below, the government erroneously concluded that it is no longer necessary to test the manner in which a federal

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[5]At the April 28, 1980 hearing the government stipulated Agent James' participation.

officer participates in a search so long as someone involved doesn't violate the Fourth Amendment - amounting to a "silver platter" doctrine.[6] *Elkins* v. *United States*, supra, of course did not involve a joint investigation by local and federal officials but rather tested the sufficiency of *state seized* evidence in a later federal prosecution. Here, the Federal Government participated in the seizing of the evidence. In differentiating between *Elkins*, supra, and the class of cases to which the instant one belongs, the Court in *U.S.* v. *Burke*, 517 F.2d 277 (2nd Cir. 1975) noted at page 382:

> "The cases that have caused difficulty are those where warrants have been issued by state judges as the result of a mingling of state and federal law enforcement".

In the instant case, Agent James was not relieved of Fourth Amendment responsibilities by the actions of the local officials whether those actions were proper or not. The overriding consideration is to test the constitutionality of the moment of federal intervention and action.

c. Substantial compliance with Rule 41 is required to satisfy Fourth Amendment.

James, an experienced agent considered to be expert, concurred that a search warrant was required to search defendants' car under the circumstances. Where a warrant is required for Federal purposes, as here, the Fourth Amendment can only be satisfied by complying with the *basic* requirements of Rule 41. Petitioners recognize that all deviation from the technical requirements of Rule 41 are not of equal weight and that all deviations do not in every case result in a violation of the Fourth Amendment. The case of *Navarro* v. *U.S.*, 400 F.2d 315 (5th Cir. 1968) applied the requirement that Rule 41 warrants issued by state judges must be issued by a judge of a state court of record. A failure of this requirement would be a basic

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[6]This would be the precise development that Judge Wisdom feared in *Navarro* v. *U.S.*, 400 F.2d 315, 317 (5th Cir. 1968).

defect. The Court, in *United States* v. *Burke*, supra, at 385, observed:

> "While *Navarro* applied the exclusionary rule, *the defect there was basic; since the issuing judge was not of a state court of record; there was in effect no warrant at all for federal purposes.*" (Emphasis added).

In the instant case, regardless of what the government contends about the stream of state events justifying a warrantless search of defendants' car, the fact is a warrant was required and *the search warrant issuing judge was not a state court of record*. The defect was basic.[7] The effect was: no warrant at all for federal purposes. No exception to the Fourth Amendment applied, and, therefore, the warrantless search by Agent James requires suppression of the evidence. Quoting Judge Wisdom in *Navarro*, supra, at 317:

> "While federal officers had not attempted to avoid the requirements of Rule 41 by seeking the assistance of City officers and while federal and local officers officers ought . . . to be encouraged to cooperate, such cooperation should comply with the rules, since permitting the continuance of other practice herein might well lead to a limited revival of the 'silver platter' practice". 400 F.2d at 319-320.

The instant case squarely presents the "Rule 41(a) issue" addressed by the 5th Circuit in *Navarro* v. *United States*, 400 F.2d 315 (5th Cir. 1968). The Fourth Circuit's treatment of the issue in this case creates a conflict among the circuits. The tacit ruling of the Court below is that unless federal agents are present at the beginning of the complained of transaction, then the question of "federal participation" is not raised.

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[7]It must be pointed out that the case of *United States* v. *Sellers*, 483 F.2d 37 (5th Cir. 1973), relied on below and quoted extensively by the government was decided when *Rule 41 had been amended to not require the state court to be a record court*. Since then, of course, the Rule has been changed to it's original form requiring the warrant to issue from a state court of record.

The 4th Circuit should have addressed the issue and affirmed the district judge's ruling, suppressing the evidence in accordance with the principles laid down by the 5th Circuit in *Navarro*, supra.

CONCLUSION

For the reasons, points and authorities cited above, petitioners pray that a writ of certiorari be granted.

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5105

UNITED STATES OF AMERICA,
Appellant,

vs.

MICHAEL RAY HALEY;
WILLIAM HARRY RIEHL
Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden II, District Judge.

Argued: October 8, 1981 Decided: January 21, 1982

Before WINTER, Chief Judge, BRYAN, Senior Circuit Judge, and HALL, Circuit Judge.

Marye L. Wright, Assistant United States Attorney (Wayne A. Rich, Jr., Acting United States Attorney on brief) for Appellant; W. Stuart Calwell, Jr. (Calwell, McCormick & Peyton, L. C. on brief) and Michael C. Allen for Appellees.

HALL, Circuit Judge:

The United States appeals from a district court order suppressing the introduction into evidence of marijuana which state police officers and a Federal Drug Enforcement agent seized from the defendants' automobile. Suppression was ordered because the officers failed to obtain a search warrant from a state court of record as required by Rule 41 of the Federal Rules of Criminal Procedure. We conclude that compliance with Rule 41 was unnecessary because the circumstances justified a warrantless search, and therefore reverse the suppression order and remand the case for further proceedings.

In the late morning hours of February 10, 1980, West Virginia State Trooper Clayton Alford was on routine road patrol on Interstate 79 just north of Charleston, West Virginia. Alford observed a 1977 Chevrolet Impala bearing Florida license plates traveling north at 74 miles an hour. He pursued the vehicle and ordered its driver to stop. Upon stopping, the driver, Michael Haley, immediately got out, met Alford at the rear of the car, and then went with Alford to sit in the trooper's police cruiser.

While sitting in the cruiser, Alford smelled an intense odor of marijuana emanating from Haley's body. In response to Alford's questioning, Haley denied that he had been smoking marijuana or that he had been in the presence of anyone who had.

The registration revealed that the automobile was registered in Florida to Daniel G. Azzole. Haley said that Azzole was a friend of his passenger, William Riehl, and that Riehl had borrowed the car for a trip.

Having detected the marijuana odor on Haley, the officer suspected that the automobile was carrying marijuana. After writing a speeding citation, Alford left Haley in the cruiser and walked to the passenger side of the vehicle where Riehl was seated. When Riehl rolled down the window, Alford again smelled an intense marijuana odor inside the car and on Riehl's body.

The defendants refused to consent to a search of their automobile, so Alford placed them in the cruiser and told them that he would get a search warrant. Riehl then admitted that a small quantity of marijuana was in the car. He led Alford to the passenger side where he removed from beneath the seat a small bag containing marijuana and some pills. Alford placed both defendants under arrest and radioed for a tow truck to tow the car to the state police barracks in South Charleston.

When the tow truck arrived, Alford removed the keys from the car's ignition and opened the trunk. The trunk was completely filled with large garbage bags made of an opaque plastic. According to Alford, one bag had a two-inch hole through which he could see marijuana. The tow truck operator testified that the trooper "stuck his fingers in the bag and ripped the bag open."[1] In any event, Alford decided he had better get a search warrant, so he closed the trunk and directed the tow truck operator to take the car to the state police barracks.

Alford notified the officers on duty at the barracks that he was bringing in the defendants and their automobile. Those officers contacted Randy James, a Federal Drug Enforcement agent, and informed him of the morning's occurrences. James went to the barracks, helped Alford prepare an affidavit for a search warrant and accompanied the officers to the Kanawha County Courthouse where Alford presented the affidavit to a county magistrate.

The magistrate gave Alford a document which Alford believed was a search warrant.[2] The officers and James returned to the barracks and searched the car. The search

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[1]The tow truck operator did not explicity state whether Alford punched a hold in the bag or whether he simply widened a pre-existing hole. Because of the other circumstances surrounding the incident, we do not find it necessary to remand this factual question for resolution.

[2]The record indicates that Alford did not receive a search warrant, but rather a copy of his own affidavit.

produced six garbage bags of marijuana under some clothing on the back seat of the car, and eleven garbage bags and two cardboard boxes of marijuana in the trunk. In all, two hundred and four pounds of marijuana were seized.

Haley and Riehl were indicted for violations of 18 U.S.C. §2 and §1952(a) (3), and 21 U.S.C. §841(a) (1). The defendants' first motion to suppress introduction of marijuana was denied on the ground that contraband was seized during a valid warrantless search. Upon a motion to reconsider, the court vacated its earlier decision and ruled that because a federal agent had participated in the search, the warrant should have been procured from a court of record pursuant to Rule 41. Because West Virginia magistrate courts are not courts of record, the district court ordered the suppression of the contraband.

On appeal, the government first contends that the officer's failure to comply with Rule 41 was non-prejudicial because the state search warrant procedure satisfied Fourth Amendment requirements. However, the record discloses that a valid state warrant was never issued, so the government's argument completely lacks a factual basis. Therefore, we do not address this contention.

Alternatively, the government argues that the circumstances justify a warrantless search of the vehicle and the containers found inside. We agree. When a law enforcement officer stops a moving vehicle, and the officer has probable cause to believe that the vehicle is carrying contraband, the vehicle may be searched without a warrant either at the scene or later at the police station. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *United States* v. *Muhammed*, No. 79-5274/75 (4th Cir., Sept. 1, 1981). Sufficient probable cause arises when the officer smells marijuana inside the vehicle. *United States* v. *Sifuentes*, 504 F.2d 845 (4th Cir. 1974). In addition, the officers may search any sealed container located inside the vehicle if the container's contents can be inferred from its outward appearance, distinctive configuration, transparency or

other characteristics, thereby bringing the contents within plain view. *Robbins* v. *California*, ____ U.S. ____, 101 S. Ct. 2841 (1981). Another characteristic which brings the contents into plain view is the odor given off by those contents. *United States* v. *Haynie*, 637 F.2d 227 (4th Cir. 1980); *Sifuentes*, 504 F.2d at 848.

This case fits squarely within the foregoing criteria. The automobile was moving at a high rate of speed when stopped by Trooper Alford. The strong marijuana odor emanating from the vehicle and the small bag of marijuana found under the seat gave Alford probable cause to believe that still more marijuana was inside, thereby justifying a warrantless search either at the scene or at the police barracks. Further, the numerous garbage bags found during the search were packed with a coarse substance which was obviously marijuana. This distinctive configuration together with the intense marijuana odor brought the contraband into plain view and justified its seizure.[3]

We therefore conclude that the search of the defendants' vehicle and the containers located therein were legitimate warrantless searches.[4] Accordingly, the suppression order entered by the district court is reversed and this case is remanded for further proceedings.

REVERSED AND REMANDED.

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[3]We do not imply that *both* distinctive configuration and odor are necessary to justify the search of the containers. This Court has previously held that odor alone is sufficient cause to search such containers as cardboard boxes. *Sifuentes*, 504 F.2d at 848. In this case, the presence of both factors emphasizes the legitimacy of the search.

[4]The defendants also argue that federal agent James could not lawfully participate in the station house search because the circumstances which confronted James when he first entered the case did not justify a warrantless search. According to the defendants, James was confronted by a car which was in police custody and thus he had no reason to proceed without a warrant. To the defendants, the events which occurred prior to James' appearance were irrelevant.

The error in the defendants' argument is that it fails to focus upon the nature of the search. Station house searches are recognized exceptions to

(Footnote 4 continued)

the warrant requirement, and are justified by events which occur when the vehicle is initially stopped on the highway. These characteristics are not dependent upon the governmental affiliation of the officers involved. Thus, once the search becomes permissible, it makes no difference for Fourth Amendment purposes whether a particular officer joins in at the invited stop or during the interval between the stop and the conclusion of the search.

WINTER, Chief Judge, dissenting:

Because I am persuaded that the majority misreads the record as to facts critical to a proper application of the law regarding warrantless searches, I respectfully dissent. I would affirm the suppression order entered by the district court.

The case involves Trooper Alford's search of a garbage bag which he found in the trunk of defendants' car. It is the majority's thesis that Trooper Alford had probable cause to search the trunk because he detected the odor of marijuana and that the intense odor, together with the distinctive configuration of the garbage bags, brought the contraband into plain view and justified its seizure.

I.

Nothing in the record supports the majority's implied factual premise that the trunk or the garbage bags gave off an odor of marijuana. Alford's testimony is that (1) he opened the trunk to take an inventory; (2) he saw marijuana through a hole in one of the garbage bags found in the trunk; and (3) he closed the trunk immediately after spotting the marijuana through the hole. Nowhere in the record does Alford suggest that he opened the trunk because it smelled of marijuana. Nowhere does he even hint that the bags themselves gave off the telltale odor.

This, of course, is not to suggest that the smell of marijuana played no role in the episode. Alford testified that he detected the odor on Haley's person while the two of them were sitting in the police cruiser. Alford stated that he again smelled marijuana—or, more precisely, marijuana smoke—when he opened the passenger door of the car and spoke with Riehl.

Concededly, on cross-examination Alford stated: "I knowed for a fact that there was a strong odor of marijuana coming from the vehicle." In context, it is clear that this remark refers to the impressions which Alford formed

from his perusal of the passenger compartment and not to any odor coming from the trunk or the bags subsequently found there.[1]

Thus there is no factual basis for the majority's contention that any distinctive odor of marijuana emanated from the trunk of the car or the garbage bags contained therein. This brings me to the majority's assertion that the bags had a "distinctive configuration" which brought their illicit contents into "plain view."

Alford did not testify that any "distinctive configuration" of the garbage bags bespoke their contents. Any such conclusion is foreclosed, moreover, by *Robbins* v. *California*, ____ U.S. ____ (1981), which, so long as it remains the law, controls this case.[2] There a plurality of the

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[1]Alford made the statement on cross-examination by way of explaining why he wished to search the car after defendants produced a small bag of marijuana from under the front seat:

Q: It was the marijuana that you were worried about?
A: No sir. The fact that it appeared that they were hiding something in the vehicle.
Q: It was the fact that they wouldn't let you search their car; is that right?
A: Yes, sir.
Q: What did you suspect was in the vehicle?
A: I did not know what was in the vehicle at that point.
Q: But you knew something was?
A: Well, I knowed that for some reason they didn't want me to search the vehicle. *I knowed for a fact that there was a strong odor of marijuana coming from the vehicle.*
Q: *That was explained by the little bag of marijuana almost an ounce, twenty-three grams; isn't that right?*
A: *Yes, sir.*
Q: *That was the smoke that you smelled; was it?*
A: *Possibly.*
Q: But you had an instinctive feeling that there was something in that car; is that what you are saying?
A: Yes, sir.
Q: And that was because these boys didn't want you to search the car?
A: Yes, sir. (Emphasis added)

[2]The Supreme Court has granted certiorari in a case largely indistinguishable from *Robbins* and has directed counsel to address the question of whether the Court should reconsider *Robbins*. *See United States* v. *Ross*, 50 U.S.L.W. 3278 (October 13, 1981).

Court held that "a container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile." ____ U.S. at ____. This rule excepts only containers the contents of which are effectively in plain view either because the container is open or "so clearly announce[s] its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer." ____ U.S. at ____. Justice Powell, the fifth vote necessary to a judgment, concurred on the ground that "the manner in which the package at issue was carefully wrapped and sealed evidenced petitioner's expectation of privacy in its contents." ____ U.S. at ____. The Chief Justice concurred in the judgment invalidating the search without opinion.

Like the plastic packages in *Robbins*, the garbage bags here were closed, opaque, and packed in a locked trunk.[3] Even under Justice Powell's theory, therefore, the containers were protected from a warrantless search because their physical characteristics and location "evidenced [defendants'] expectation of privacy in [their] contents." *See also* ____ U.S. at ____ (plurality opinion). Furthermore, the plastic bags cannot be said to have made their "contents . . . obvious to an observer" by any "distinctive configuration." Garbage bags are commonly used to store and transport many things besides contraband, and the fact that several such containers were found in the trunk does not exclude myriad innocent uses. The inference that the garbage bags contained marijuana undoubtedly seemed compelling to Alford, who, (like the officer in *Robbins*) had just discovered marijuana in the front seat. The *Robbins* Court held, however, that such an inference is not reasonable within the meaning of the Fourth Amendment.

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[3]As noted above, Alford testified that one of the bags had a two-inch hole in it—a point I will address hereafter. For present purposes, it is sufficient to note that the majority's plain view theory disavows any reliance upon this questionable evidence.

II

As I have shown, the record does not support an assertion that Alford detected the odor of marijuana emanating from the bags or the trunk, and there is no legal or factual basis for a claim that the bags revealed their contents by any distinctive configuration. I am brought, then, to a contention of the government noticed but not relied upon by the majority in upholding the validity of the search. It is the claim that Alford could see the contents of one bag because it had a hole in it.

Alford did testify that he saw marijuana through a hole in one of the bags, and he also testified that he neither created the hole in the bag, nor widened it. However, Laner, the tow truck operator, testified that Alford "reached his hand in and tore one of the big bags open . . . . [H]e stuck his fingers in the bag and ripped the bag open." The district court discredited Alford's testimony "where it was contradicted by Mr. Laner as to the ripping open of the garbage bag containing marijuana in the trunk of the car." This credibility determination is one that we cannot disturb.

In its statement of facts, the majority suggests that Laner's testimony and Alford's testimony are not necessarily inconsistent: "The truck operator did not explicitly state whether Alford punched a hole in the bag or whether he simply widened a pre-existing hole." Concededly, Laner was never specifically asked whether there was a hole in the bag before Alford ripped it open. As I read the transcript, however, Laner clearly implied that any hole was of Alford's making. The district court, moreover, found that Alford testified falsely when he denied ripping the bag. Any ambiguity in the conflict between Laner's and Alford's testimony must therefore be resolved against Alford.

Alford engaged in a warrantless search when he ripped the garbage bag open. Because there is no basis in fact or law for applying the plain view exception to the warrant

requirement, I would affirm the district court's order suppressing the use of evidence illegally obtained.[1]

[1]In response to defendants' first suppression motion, the district court upheld the validity of the search under the Fourth Amendment. In my view, that ruling was erroneous. The trial judge later vacated that ruling and suppressed the evidence because a subsequent stationhouse search was conducted under a state warrant that failed to meet the requirements of Federal Rule of Criminal Procedure 41(a). This position is somewhat problematical, because, if the roadside search was valid, it is unclear why a warrant was required for the ensuing search at the stationhouse. Since I conclude that Alford's initial search of the garbage bag was unlawful under the Fourth Amendment, however, I would suppress as tainted fruit the evidence seized at the stationhouse. Like the majority, I find it unnecessary to address the rule 41(a) issue.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON

CRIMINAL NO. 80-20010-01

UNITED STATES OF AMERICA

vs.

MICHAEL RAY HALEY and
WILLIAM HARRY RIEHL

ORDER

On the 28th day of April, 1980, came the United States of America by James S. Arnold and Marye L. Wright, Assistant U.S. Attorneys, and came also the defendant, Michael Ray Haley, in person and by W. Stuart Calwell, Jr., his attorney, and came also the defendant, William Harry Riehl, in person and by Michael C. Allen, his counsel, for hearing upon defendant's pre-trial motions to reconsider defendants' earlier motion to suppress evidence and return personal property and on defendants' amended motion to suppress evidence filed in this matter.

Thereupon, the Court heard evidence adduced on behalf of the United States of America and on behalf of the defendants, and argument of counsel in connection with the aforesaid motions.

Whereupon, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendants, Michael Ray Haley and William Harry Riehl, were traveling north on Interstate 79 on February 10, 1980, when Haley were stopped by Trooper Alford, West Virginia Department of Public Safety, near milepost 6 north of Charleston, Kanawha County, West Virginia, for a speeding violation;

2. Defendants were traveling in a borrowed automobile;

3. Defendants were arrested on state court charges of possession of marijuana with intent to deliver;

4. Defendants' car was impounded at the South Charleston State Police Detachment, 725 Jefferson Road, South Charleston, West Virginia;

5. Randy James, Federal Drug Enforcement Administration, was called to assist on the case February 10, 1980;

6. Federal Agent James participated in the procurement of a state court search warrant before Kanawha County, West Virginia Magistrate John Miller on February 10, 1980;

7. Federal Agent James participated in the search of defendants' vehicle;

8. Federal Agent James had sufficient time to obtain a search warrant pursuant to Rule 41 of Federal Rules of Criminal Procedure prior to the search of defendants car;

CONCLUSIONS OF LAW

9. The defendants have standing to assert their Fourth Amendment rights relative to the search of the automobile;

10. The search of defendants' automobile was a federal undertaking and as such the requirements of Rule 41, Federal Rules of Criminal Procedure apply;

11. The search of defendants' car did not comply with Rule 41 of the Federal Rules of Criminal Procedure inasmuch as no search warrant was obtained either from a federal magistrate, a federal judge, or a state court of record;

It is accordingly ORDERED:

12. That the Court's earlier order denying defendants' motion to suppress evidence and return personal property be and the same hereby is vacated;

13. That the defendants' amended motion to suppress evidence and return personal property be and the same hereby is granted and the evidence seized from defendants' car is hereby ORDERED suppressed.

ENTERED this 1st day of July, 1980.

s/Charles H. Haden II
Judge

s/W. Stuart Calwell, Jr.
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Opposition

Office - Supreme Court, U.S.
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MAY 24 1982
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No. 81-1815

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL RAY HALEY AND WILLIAM HARRY RIEHL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, a warrant was required to conduct a station house search of plastic garbage bags found in a lawful probable cause search of the trunk and passenger compartment of petitioners' car.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Chambers v. *Maroney*, 399 U.S. 42 6

Robbins v. *California*, No. 80-148 (July 1, 1981) 4, 5

United States v. *Johnson*, No. 80-1608, argued February 24, 1982 6

United States v. *Ross*, No. 80-2209, argued March 1, 1982 ..... 5, 6

Constitution, statutes and rules:

United States Constitution, Fourth Amendment 6

18 U.S.C. 1952(a)(3) 1

21 U.S.C. 841(a)(1) 1

Fed. R. Crim. P.:

Rule 41 4

Rule 41(a) 6

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-11A) is reported at 669 F. 2d 201.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1982. The petition for a writ of certiorari was filed on March 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were charged in a two count indictment with travelling in interstate commerce with intent to carry on an unlawful activity, namely, the possession and distribution of marijuana, in violation of 18 U.S.C. 1952(a)(3), and with possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Prior to trial, the district court

suppressed the marijuana as the fruit of an illegal search (Pet. App. 13A-14A). The court of appeals reversed (Pet. App. 1A-11A).

1. The evidence at the suppression hearing showed that on February 10, 1980, petitioners were stopped for speeding while driving on an interstate highway in West Virginia. As Trooper Clayton Alford wrote out a traffic citation, he noticed a strong smell of marijuana emanating from Haley. He later noticed the same odor coming from the passenger compartment of Haley's car.[1] When questioned about the smell, Haley denied that he had any marijuana, and both petitioners refused Trooper Alford permission to search the car. But after Alford advised the two men that he intended to obtain a search warrant, petitioner Riehl acknowledged that the car contained marijuana. He removed a small plastic bag from under the front seat on the passenger side of the car and gave it to Alford. Trooper Alford arrested the two men for possession of marijuana. After receiving *Miranda* warnings, Haley also produced a small bag of marijuana (Tr. 3-14).[2]

Trooper Alford called for a truck to tow petitioners' car to the police station. When the truck arrived, he removed the keys from the car and opened the trunk to take a mental inventory of the contents.[3] Inside, the trooper saw several green plastic garbage bags. The trooper then either ripped a bag open and saw the marijuana or widened a pre-existing

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[1]The car did not belong to either petitioner, but rather was registered to a friend who did not accompany them on their trip. Both Haley's driver's license and the motor vehicle registration were issued in Florida (Tr. 7-8).

[2]"Tr." denotes the transcript of the April 10, 1980, suppression hearing.

[3]As Alford explained, he scanned the contents of the trunk to protect himself in case petitioners subsequently claimed that something was missing (Tr. 14-15).

hole through which marijuana was visible. He showed the tow truck driver the contraband. (Tr. 14-15, 79-82.)[4]

Thereafter, the car was towed to police headquarters and Trooper Alford went to a local magistrate to obtain a search warrant. With the assistance of an agent of the federal Drug Enforcement Administration, Alford applied for a warrant and swore out an affidavit. However, he apparently departed with only a copy of the affidavit and complaint, but without a search warrant, since the record fails to disclose that any warrant had actually been issued. Upon returning to headquarters, he and several of his colleagues searched the car. Eleven bags and two boxes of marijuana were found in the trunk, and six garbage bags containing marijuana were seized from the back seat. These six bags had been concealed underneath clothing (Tr. 16-21, 27, 29).

2. Following the suppression hearing, the district court credited all of the testimony of Trooper Alford, except his denial of having ripped open the garbage bag in the trunk. On that one point, the court credited the contrary testimony of the tow truck driver (Tr. 101). The district court initially denied the suppression motion (Tr. 101-108), concluding that the search was supported by probable cause and fell within the automobile and inventory exceptions to the warrant requirement (Tr. 103-107). Thereafter, the court vacated

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[4]The trooper testified that the bag was already torn and the marijuana visible when he opened the trunk, and that he did not widen the hole (Tr. 15-16, 60). The tow truck operator testified (Tr. 82) that Alford had ripped the bag. The district court credited the operator's testimony to the extent of the conflict (Tr. 101), but the majority of the court of appeals thought it unclear whether the court had discredited all of Alford's testimony on this point or only his assertion that he had not widened a pre-existing hole. Because the case was decided on other grounds the majority thought it unnecessary to resolve this question or to remand for further findings (Pet. App. 3A n.1). Judge Winter, dissenting, concluded that the district court had discredited Alford's testimony about the bag in the trunk in its entirety (*id.* at 10A).

its oral ruling and issued a written order, suppressing the marijuana seized from both the trunk and the passenger compartment on the ground that Trooper Alford had not complied with Rule 41, Fed. R. Crim. P. (Pet. App. 13A-14A).

A divided court of appeals reversed (Pet. App. 1A-11A). The court held that the officers had probable cause to believe that the car contained marijuana and were permitted to search the car either on the scene or later at the police station when the car was impounded. The court held further that the officers were authorized to open the garbage bags because their contents could be inferred from their outward appearance and odor (Pet. App. 4A-5A; footnote omitted):

> [T]he numerous garbage bags found during the search were packed with a coarse substance which was obviously marijuana. This distinctive configuration together with the intense marijuana odor brought the contraband into plain view and justified its seizure.

The court accordingly distinguished the case from *Robbins* v. *California*, No. 80-148 (July 1, 1981).

Chief Judge Winter dissented on the ground that the record does not support an application to the searches in this case of the plain view exception to the warrant requirement (Pet. App. 7A-11A).

ARGUMENT

1. Petitioners contend (Pet. 5-11) that the green garbage bags were opened unlawfully by the state troopers, and that therefore the court of appeals should not have reversed the order of the district court suppressing the marijuana. Whatever the merits of the petitioners' contentions, they are not presently ripe for review by this Court. Petitioners have yet to be tried, and the district court has stayed further proceedings pending disposition of these petitions. The court of appeals' decision places petitioners in precisely the position

they would have occupied if the district court had denied their motion to suppress in the first instance. They would not have been permitted to appeal such a ruling prior to trial. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their present contention to this Court, together with any other claims they may have, in petitions for a writ of certiorari seeking review of final judgments against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.

2. Petitioners' principal attack on the legality of the search of the marijuana-laden garbage bags relies (Pet. 5) on the holding of this Court in *Robbins* v. *California*, No. 80-148 (July 1, 1981). While the result in *Robbins* is presently being reconsidered by this Court in *United States* v. *Ross*, No. 80-2209, argued March 1, 1982, there is no need to hold this petition for *Ross*. It is true that, if the government prevails in *Ross*, the Court's decision would very likely foreclose petitioners' claim, eliminating any need to consider the alternative grounds for upholding the search upon which the court of appeals' majority relied. This, however, simply counsels in favor of allowing the trial to proceed and deferring further appellate consideration of the legal issues surrounding the search until after conviction, if any.[5] We also note our position that the decision in

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[5]Moreover, much of the dispute between the majority and the dissent in the court of appeals concerns the circumstances relating particularly to the search of the contents of the trunk of the automobile in which petitioners were transporting the marijuana. Nearly half of the marijuana was, however, found in the bags in the back seat of the automobile. In order for petitioners to avoid conviction, they may well have to obtain suppression of both lots of marijuana. It is possible that the prosecution will introduce only the marijuana from the back seat at trial, which would entirely moot the portion of the controversy surrounding the marijuana in the trunk. This possibility further supports

Robbins, even if adhered to in *Ross*, could not properly be applied to the search in the instant case, which antedated *Robbins* by nearly a year and a half. The Court's decision in *United States* v. *Johnson*, No. 80-1608, argued February 24, 1982, will shed further light on this point, but the penddency of *Johnson* similarly affords no reason for holding this petition and delaying further proceedings in the district court in this case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

MAY 1982

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the conclusion that it is premature at this point to attempt further review of the issue presented by the petition. The question whether there is here an issue worthy of review (which we do not believe there is) can intelligently be resolved only after trial.

[6]Petitioners also contend (Pet. 5-11) that because Trooper Alford secured assistance from a federal DEA agent, this was a federal search and that Alford violated Fed. R. Crim. P. 41(a) in seeking a search warrant from a local magistrate tather than a judge of a state court of record. There is no occasion to consider this contention, for the court of appeals determined (Pet. App. 2A, 4A) that no state warrant was ever issued and accordingly rested its decision upon the conclusion that the search fell within an exception to the warrant requirement of the Fourth Amendment. And, contrary to petitioners' submission (Pet. 8-9), the circumstances that justified a warrantless search did not evaporate when the federal agent entered into the picture. Petitioner's argument is irreconcilable with *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

DOJ-1982-05